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No. 362

In the Supreme Court of the United States

OCTOBER TERM, 1962

MICHELE MARCHESE, PETITIONER

v.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ARCHIBALD COX,
Solicitor General,
HERBERT J. MILLER, JR.,
Assistant Attorney General,
PHILIP R. MONAHAN,
Attorney,
Department of Justice,
Washington 25, D.C.

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OPINIONS BELOW

The opinion of the court of appeals (R. 100–104; Pet. App. C, pp. 4–9) is reported at 304 F. 2d 154. The opinion and order of the district court (R. 54; Pet. App. B, p. 3) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 1962 (R. 105), and a petition for rehearing was denied on July 12, 1962 (R. 106). The petition for a writ of certiorari was filed on August 22, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, following denial of a motion under 28 U.S.C. 2255 to set aside a conviction, a petition for a writ of habeas corpus seeking the same relief was properly denied for lack of jurisdiction.

2. Whether, if the habeas corpus petition be treated as a second motion under 28 U.S.C. 2255 (the place of imprisonment being within the jurisdiction of the sentencing court), the petition was in any event properly denied.

STATUTE INVOLVED

Section 2255 of Title 28 of the United States Code provides:

> § 2255. *Federal custody; remedies on motion attacking sentence.*
>
> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, de-

termine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pur uant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

STATEMENT

The petition for a writ of certiorari seeks review of a judgment of the Court of Appeals for the Ninth Circuit affirming an order of the United States District Court for the Southern District of California denying, for lack of jurisdiction, a petition for a writ of habeas corpus. The pertinent facts are as follows:

1. On June 16, 1958, petitioner was convicted in the district court on ten counts of an indictment charging him and one Del Bono, a co-defendant, with conspiracy to violate the narcotics laws and with making three illegal sales of heroin. Petitioner was sentenced to concurrent terms of ten years' imprisonment. On April 15, 1959, his conviction was affirmed (*Marchese* v. *United States*, 264 F. 2d 892 (C.A. 9)), and on June 29, 1959, this Court denied certiorari (360 U.S. 930).

The evidence adduced at the trial (see brief in opposition to certiorari, Nos. 922 and 898 Misc., Oct. Term, 1958, *Marchese* v. *United States* and *Del Bono* v. *United States*, pp. 4–7) showed that petitioner, on three occasions between January 30 and March 13, 1958, sold heroin to Donald Sussman, a user of narcotics, who, during this period, was acting as a government informer. Sussman had been selling drugs on consignment for petitioner for some four years previously and had been arrested shortly before January 30. During the next six weeks he cooperated with government officers in a joint federal-state investigation of petitioner's narcotics activities. The government's proof consisted in part of incriminating statements made to Sussman by petitioner in the apartment

of a Miss Nichols, where petitioner also lived. These statements had been overheard by two of the officers through the use of a radio transmitter concealed on Sussman's person. Other evidence consisted of statements made by petitioner to Sussman over the telephone, which one of the officers overheard by placing his ear next to the receiver with Sussman's permission.

2. On November 16, 1960, petitioner, through counsel, filed in the district court a motion to vacate his conviction under 28 U.S.C. 2255 (R. 65–91). The grounds relied on, in the language of the motion (R. 66), were as follows: (1) "The judgment of conviction by use of 'silver platter' evidence is in violation of the due process of law clause of the Constitution * * *"; [1] (2) "The exclusionary rule prohibits the use of the testimony of a government witness induced by immunity in fact or direct promise by responsible government authorities and such a judgment of conviction must be annulled * * * as it is violative of * * * due process * * *"; and (3) "The trial resulting in the judgment of conviction * * * was neither fair nor impartial and was the result of

[1] Actually, the so-called "silver platter" doctrine (the rule that evidence unlawfully seized by state officers is admissible in a federal prosecution if the illegal seizure was not participated in by federal officers), which the Court overruled in *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253, was not involved at petitioner's trial. As pointed out in the government's opposition to the Section 2255 motion (R. 95), there was no search or seizure in this case except with respect to a dismissed count, and the principle would not have been applicable in any event since federal agents participated with state officers in the conduct of the investigation.

the highly prejudicial and calculated misconduct of the prosecutor by knowingly presenting unreliable and inadmissible evidence, in violation of the due process of law clause * * *." In substance, the motion challenged the trustworthiness and admissibility of Sussman's testimony on the grounds that he was an addict-informer who allegedly had been promised preferential treatment and a light sentence if he would aid the narcotics agents in making a case against petitioner (R. 81–82, 83–84, 85, 91). The motion also disputed the admissibility of the evidence obtained through the use of the radio transmitter (R. 78–79).

The government opposed the motion (R. 94–95) on the ground that, aside from petitioner's reliance on the rejection by this Court of the "silver platter" doctrine in *Elkins* v. *United States,* 364 U.S. 206 (which, the government pointed out, had no relevance to this case (see fn. 1, *supra,* p. 5)), the motion, in substance, did no more than challenge the credibility of Sussman and the government's use of a transmission device attached to the person of Sussman (R. 95). It was pointed out that those issues had already been litigated at the trial and on the appeal, and that a motion under 28 U.S.C. 2255 does not lie to raise matters which were in fact or should have been raised on appeal (*ibid.*).

On March 15, 1961, following argument, the motion to vacate was denied as "not well taken" (R. 96). No appeal was taken.

3. On June 20, 1961, acting through the same attorney who represented him in the Section 2255 proceeding and one additional lawyer, petitioner filed

the petition for a writ of habeas corpus here involved, in which he again challenged the validity of his conviction (R. 2–47). (The institution in which petitioner was serving his sentence was within the jurisdiction of the sentencing court.) Averring that he had "complied with the prerequisite of Title 28 U.S.C., Section 2255, by motion in the trial court to vacate and set aside the judgment," the denial of which, he said, while erroneous, was necessary to the jurisdiction of the court to issue a writ of habeas corpus, he stated that "[t]he issues involved * * *, although passed and repassed upon by the trial court, are not within the rule of res judicata * * *" (R. 5–6). The petition proceeded to enumerate six "points and grounds" for granting the relief sought, as follows (R. 13–14):

> 1. The judgment of conviction by the use of "silver platter" evidence is in violation of the Due Process of Law Clause of the Constitution of the United States;
>
> 2. Sussman's entire course of behavior from January 29, to March 13, 1958, was part of an agreement and conspiracy between himself and Federal and State authorities to ensnare the petitioner, in exchange for money, [n]arcotics, favoritism and lenieney for himself. Such course of conduct and subsequent testimony, over objections, denied the petitioner a fair and impartial trial guaranteed him under the Fifth Amendment of the United States Constitution;
>
> 3. During the petitioner's trial, the United States Attorney abused the privileges of his office by actively participating in the suppres-

sion of the truth and failing to disclose the truth concerning the obvious agreement or understanding between Donald Sussman and the Federal and State authorities, contrary to their oath of office and in disregard of the petitioner's constitutional rights under the Fifth Amendment;

4. The use of evidence obtained by the electronic recording device known as the Schmidt Transmitter was unlawful and violative of the Fourth Amendment of the Constitution, and hence cannot support the judgment of conviction;

5. The arrest of the petitioner without a warrant of arrest, the search of his person and of his apartment or residence, the search of the automobile driven by the defendant Del Bono, as well as the searches made at other places without a search warrant, were all in violation of the Fourth Amendment;

6. The evidence obtained by an unauthorized interception of a telephone conversation is in violation of Title 47, U.S.C.A., Section 605, as well as in violation of the Fifth Amendment to the Constitution.

The government filed a return (R. 48) stating that the court was without jurisdiction to entertain the habeas corpus petition. It pointed out that Section 2255 (*supra*, pp. 2–3) prohibits entertaining an application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion under that section if it appears that the applicant has failed to apply for such relief, or

that such relief has been denied, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention (R. 49). The government further pointed out that the petition acknowledged that the issues sought to be raised had been "passed and repassed upon by the trial court," and stated that the record revealed that petitioner had "presented the identical questions to the trial court, the Appellate Court and then again to the trial court in a motion under [28 U.S.C. 2255], and that in each instance his contentions were rejected" (*ibid.*). The government's answer further observed that, if the petition were considered as a second motion under Section 2255, that section provides that the sentencing court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" (*supra,* p. 3) (R. 52).

On June 29, 1961, the district court denied the petition in an order reading (R. 54; Pet. App. B):

> An examination of the Petition for Writ of Habeas Corpus * * * discloses that after conviction in this court, the conviction was affirmed by the judgment of the United States Court of Appeals for the Ninth Circuit; that thereafter the Petitioner filed a motion under 28 U.S.C. 2255, which motion was denied.
>
> From the face of the Petition, it also appears that the issues presented have been "passed and re-passed upon by the Trial Court."
>
> In view of the foregoing, this Court lacks jurisdiction to entertain the Writ [*Jones* v. *Squi*[*er*] (9 Cir. 1952) 195 F. 2d 179], and

accordingly the Petition for the Writ is denied, and it is ordered dismissed.[2]

4. On appeal from the latter order, petitioner, revoking his concession that the issues sought to be raised had been "passed and repassed upon by the trial court,"[3] argued that the third, fourth, fifth and sixth grounds of the habeas corpus petition (*supra*, pp. 7–8) presented new issues not involved in the motion under Section 2255 (R. 102; Pet. App. C, p. 7).

The court of appeals held that petitioner, "having failed to appeal from the denial of his motion under § 2255, may not now question either the ruling on that motion, or the validity of his sentence, by use of habeas corpus" (R. 102; Pet. App. C, p. 7). The court further held that petitioner "fare[d] no better" if the habeas corpus petition were treated as a second motion under Section 2255. Observing that Section 2255 provides that the sentencing court shall not be

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[2] It is apparent from the court's citation of *Jones* v. *Squier*, 195 F. 2d 179 (C.A. 9), for its holding that it lacked jurisdiction to entertain the petition that it predicated its decision on the ground that Section 2255 provided an adequate remedy and a motion under that section had previously been denied—not merely that the petition raised issues that had been "passed and re-passed upon." For the *Jones* decision was based on the former, not the latter, ground. Where a second or successive motion for similar relief is filed under Section 2255, that section provides that the court "shall not be required to entertain" the motion. The court may consider it, however, as a matter of discretion.

[3] Petitioner stated in his court of appeals brief (on which he was represented by the same attorneys who had represented him in the district court) that the concession was "probably the result of a careless and inadvertent expression" (p. 13).

required to entertain a second or successive motion for similar relief on behalf of the same prisoner, and that petitioner acknowledged that two of the grounds relied on in the habeas corpus petition had been urged in the Section 2255 motion, the court held, with respect to the allegedly new grounds, (1) that these grounds were not cognizable under Section 2255, and (2) that, even if they were, and if they might be considered new, the petition was nevertheless defective on its face because it failed to explain why the new grounds could not have been asserted in the earlier motion or to allege that the petitioner had been previously unaware of the significance of the relevant facts. For the latter aspect of its holding, the court cited its prior decision in *Sanders* v. *United States*, 297 F. 2d 735, pending on certiorari, No. 202 (R. 102–104; Pet. App. C, pp. 7–9).

ARGUMENT

We submit that the petition for a writ of habeas corpus was properly denied and that there is no need to reach the issue presented in the *Sanders* case.

1. Section 2255 (*supra*, p. 2–3) prohibits resort to habeas corpus where the remedy by motion under that section is adequate and it appears that relief thereunder either has not been sought or has been denied. The district court, accordingly, was correct in holding that, in view of the prior denial of petitioner's Section 2255 motion, seeking identical relief, it was without jurisdiction to entertain the habeas corpus petition. Petitioner's challenge of the validity of this aspect of Section 2255, as violative of the consti-

tutional prohibition against suspension of the writ of habeas corpus (Pet. 18–19), is without substance. *United States* v. *Hayman*, 342 U.S. 205; *Hill* v. *United States*, 368 U.S. 424, 427–428.

2. If the habeas corpus petition be treated as a second motion under Section 2255, its denial was in any event correct, as the court of appeals held.

The first two grounds relied on in the petition were concededly the same in substance as the grounds urged in the Section 2255 motion, from the denial of which petitioner took no appeal.[4] As pointed out in the government's opposition to the Section 2255 motion (*supra*, p. 6), and as the district court, in denying the motion, held (*supra*, p. 6), neither ground presented an issue cognizable under Section 2255. One of the grounds, indeed, as indicated above, was based on a mistaken notion of the meaning of the "silver platter" principle.

Of the four grounds claimed by petitioner to involve new matter, two of the items, 4 and 6 (*supra*, p. 8), related to alleged errors in the admission of evidence at petitioner's trial. It is, of course, "settled law that a motion * * * under 28 U.S.C.

[4] For this reason, even if one or both of these grounds had been otherwise cognizable under Section 2255, the second motion (to the extent it relied on those grounds) would have been deniable as a matter of discretion under the paragraph of Section 2255 which states that the court "shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner" (*supra*, p. 3). See, *e.g.*, *Long* v. *United States*, 245 F. 2d 871 (C.A. 6), certiorari denied, 355 U.S. 878; *Burns* v. *United States*, 229 F. 2d 87, 89 (C.A. 8), certiorari denied, 351 U.S. 910; *Jackson* v. *United States*, 224 F. 2d 556 (C.A. 4), certiorari denied, 350 U.S. 924.

§ 2255 cannot be used in lieu of an appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights * * *." *Davis* v. *United States*, 214 F. 2d 594, 596 (C.A. 7), certiorari denied, 353 U.S. 960, and cases cited.[5]

A third ground, No. 5 (*supra*, p. 8), involved claimed illegality in the maner in which petitioner was arrested and certain searches were conducted, and was even more remote from anything cognizable under Section 2255.[6]

The only one of the six grounds which even superficially presented the type of issue properly cognizable under Section 2255 was the third (*supra*, pp. 7–8), charging that the United States Attorney "abused the privileges of his office by actively participating in the suppression of the truth and failing to disclose the truth concerning" an alleged "obvious agreement or understanding between Donald Sussman and the Fed-

[5] The evidence in question was in any event properly received. As to the statements of petitioner overheard by the officers through the use of the radio transmitter (ground 4), cf. *On Lee* v. *United States*, 343 U.S. 747; as to his statements made to Sussman over the telephone and overheard by an officer with Sussman's permission (ground 6), see *Rathbun* v. *United States*, 355 U.S. 107. The admissibility of the telephone evidence, moreover, involved at most a matter of petitioner's statutory, not his constitutional, rights.

[6] The search of petitioner's person and apartment at the time of his arrest did not, as petitioner acknowledges (Pet. 16), result in the discovery of any evidence sought to be used at the trial. As for the narcotics which were removed by Sussman from Del Bono's automobile (see *ibid.*), even if this removal amounted to an illegal seizure, it was not one of which petitioner could complain. In any event, the most that would be involved, here again, would be a question of the admissibility of evidence.

eral and State authorities." Examination of the specific allegations made under this head, however, reveals not only that the "agreement or understanding" which the petition claimed had been made between Sussman and the agents was entirely the product of surmise and conjecture on petitioner's part, but that the very portion of the trial record on which the petitioner predicated his charge that the United States Attorney took an active part in suppressing relevant truth specifically refuted the accusation.

The petition alleged that prior to the trial the complaint on which Sussman was arrested was dismissed, and a lesser charge, carrying a lighter penalty, was substituted; that he was thereafter sentenced to two years' imprisonment, the minimum imposable under the substituted charge; and that, following revocation of his probation under a prior state narcotics conviction, he was sentenced to one year's imprisonment thereunder, to run concurrently with his federal sentence, with the consequence that the state sentence did not increase the period of his imprisonment. On the basis of these representations the petitioner asked, rhetorically, whether "a deal" had been made between Sussman and the narcotics agents whereby Sussman, in exchange for the agents' influence in securing lenient disposition of the state and federal charges, would cooperate with the agents in bringing about the arrest and conviction of petitioner, and answered with the assertion that "[e]ven the most naive person would have trouble putting his head in the sand to refuse to see this *apparent* bargain * * *" [emphasis added] (R. 21).

This "apparent bargain," the petition went on to allege, had been concealed by the United States Attorney at the trial. That officer, it was said (R. 22),—

> not only stood by and permitted such a bargain to go undisclosed, but he took an active part in suppressing the evidence with respect to the same, and even permitted Agent Richards to deny that any such bargain was made.

The petition attempted to document this accusation by citing passages from the trial transcript showing (1) that agent Richards denied on cross-examination that he, or anyone in his presence, had told Sussman that he would receive a lighter sentence than he might otherwise get if he would cooperate with the agents in their investigation of petitioner, (2) that Sussman acknowledged on cross-examination that his cooperation with the agents was motivated in part by the hope of receiving a lighter sentence and that he knew he would "probably" get a lighter sentence if he cooperated (the petition argued that Sussman thereby impliedly denied that there was an actual agreement), and (3) that, when agent Richards was asked on cross-examination whether he had made "some kind of an agreement with" Sussman, the United States Attorney objected to the question (R. 22–23).

Obviously, however, agent Richards was not shown to have testified falsely in denying that he had been a party to an agreement with Sussman, the very existence of which was purely conjectural. The same is true of Sussman's testimony—even if we construe it, with petitioner, as impliedly denying that an agreement had been made. Much less was there any indi-

cation that the United States Attorney knowingly permitted false testimony to stand. As for the charge that government counsel, by objecting to the question asked of agent Richards as to whether he had made an agreement with Sussman, "actively participat[ed] in the suppression of the truth," the record shows that the objection was based solely on the ground that the question "called for a conclusion of the witness;" the attorney made it specifically clear that he had no objection to the elicitation of any relevant "facts" (R. 23).

In short, the trial record, on which petitioner relied as showing the commission of perjury and the suppression by the government of relevant evidence, wholly failed to support any such accusation. Thus, ground 3 of the petition, like the others, presented nothing which either required or warranted a hearing under Section 2255, and the petition was properly denied even if viewed as a second motion under that section.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
PHILIP R. MONAHAN,
Attorney.

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